

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARIN D. TAYLOR,

Defendant-Appellant.

UNPUBLISHED

July 17, 2003

No. 240004

Wayne Circuit Court

LC No. 01-006216

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), and possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii). He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of twenty-eight months to six years' imprisonment for each conviction. Defendant appeals as of right. We affirm.

Defendant first argues that testimony of a police witness referring to defendant's post-*Miranda*¹ silence deprived him of due process and a fair trial and is grounds for reversal. We disagree. Since defendant failed to preserve this issue by objecting to the testimony, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.* We find that admission of this evidence did not affect defendant's substantial rights.

As a general rule, the use of defendant's post-*Miranda* silence is restricted in a criminal trial in accordance with the constitutional right of due process. *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001), citing *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976). However, a single, brief assertion of a defendant's silence does not automatically violate

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

the defendant's rights when the government does not attempt a specific inquiry regarding the defendant's silence. *Dennis, supra* at 579-580, citing *United States v Stubbs*, 944 F2d 828 (CA 11, 1991). It is the *use* of an accused's silence at trial by a specific inquiry that forms the basis of a fourteenth amendment violation. *Id.*

In this case, the witness mentioned defendant's post-*Miranda* silence in response to an open-ended question asked by defense counsel:

Q. You didn't do anything else regarding this case?

A. I offered the defendant if he wanted to make a statement and he refused.

This was the only mention of defendant's silence throughout the case, and the prosecution never made an inquiry into this issue. Under these circumstances, we find that defendant's right to silence was not violated. *Dennis, supra*. In any event, there is no prejudice to defendant given the overwhelming evidence against him, including an in-court identification of defendant by the person to whom defendant sold the marijuana, as well as the retrieval of four zip locks bags of marijuana and a marked \$10 bill from a pipe into which defendant was observed throwing a bag.

Defendant also argues that his attorney's failure to object to the above-quoted testimony constitutes ineffective assistance of counsel. A claim of ineffective assistance of counsel mandating reversal of conviction requires that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant as to deprive him of a fair trial. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). "Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 314, quoting *Strickland, supra* at 466 US 694. Even if counsel's performance fell below an objective standard of reasonableness, the error was not prejudicial. In light of the overwhelming evidence of guilt, there is not a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White